STATE OF MICHIGAN
IN THE SUPREME COURT

TERI WALTERS and KIM WALTERS,

Plaintiffs-Appellees

-v-

Supreme Court No 154489
Court of Appeals No. 319016
LC No. 12-658-NH
(Eaton County Circuit Court)

DONALD S. FALIK, D.D.S., d/b/a FALIK FAMILY DENTISTRY, ROBERT C.FALIK, D.D.S., and JANE DOE, jointly and severally

Defendants-Appellants.
_____/

AMICUS CURIAE BRIEF OF THE MICHIGAN ASSOCIATION FOR JUSTICE

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STATEMENT OF ISSUES PRESENTED

I. Does an expert's opinion meet threshold reliability criteria for admissibility under MRE 702, MCL 600.2955, *Daubert* and progeny, when an expert relies on analogous, but not "on-point," peer-reviewed literature (in addition to the expert's own experience, knowledge and expertise) to extrapolate an expert opinion?

Plaintiff-Appellee argues "Yes"

Defendant-Appellant argues "No"

Amicus Curiae answers "Yes".

II. Should this Court deny leave to appeal and decline to radically change existing Michigan law regarding threshold reliability criteria for admissibility of expert opinions to require "on-point" peer-reviewed literature in support of an expert's opinions?

Plaintiff-Appellee argues "Yes"

Defendant-Appellant argues "No"

Amicus Curiae answers "Yes".

INTEREST OF AMICUS CURIAE

The Michigan Association for Justice (MAJ) is an organization of Michigan lawyers engaged primarily in litigation and trial work. The Michigan Association for Justice recognizes an obligation to assist this Court on important issues of law that would substantially affect the orderly administration of justice in the trial courts of this state. This case presents a novel interpretation by Defendants on issues of law, and the Court's decision could have far-reaching consequences that would affect all jury trials.

INTRODUCTION

This appeal examines the judicial role in determining threshold admissibility of expert opinions under MRE 702 and MCL 600.2955. The unique issue presented before the Court is whether an expert must find peer-reviewed literature that is "on-point" to support an opinion to meet threshold reliability criteria for admissibility under MRE 702, MCL 600.2955, *Daubert* and progeny, or whether the reliability criteria allow an expert to rely on analogous, but not "on-point," literature to extrapolate an expert opinion. MAJ submits that MRE 702, MCL 600.2955, *Daubert* and progeny do not require "on-point" peer-reviewed literature to support expert opinions, and there is no good reason to change existing law. This Court should deny leave to appeal and leave in place Michigan's existing, well-formed jurisprudence on the issue.

In *Walters*, Plaintiffs claim that exposure to phosphoric acid in a dental etching solution administered by Defendants triggered the onset of Wegener's granulomatosis (WG), an autoimmune disease that Teri Walters was diagnosed with after the exposure. Plaintiffs' causation expert, Dr. M. Eric Gershwin, was prepared to testify in support of a causal connection between the exposure to phosphoric acid and WG. Dr. Gershwin relied on multiple sources of peer-reviewed medical literature, in addition to his own expertise, to support his opinion that Ms. Walters's exposure to the phosphoric etching solution caused her onset of WG. Dr. Gershwin was not, however, able to find an "on-point" medical study that showed a causal link between oral exposure to the exact etching solution administered to Ms. Walters (one that is not meant to be administered to humans) and WG.

The lack of an "on-point" medical study is not surprising since no medical protocol

or ethical rationale would *ever* allow such a clinical test. In order for such an "on-point" medical study to exist, someone would have to voluntarily consent to being exposed to caustic chemicals and risk contracting an autoimmune disease. Such a clinical experiment would be barbaric and inhumane. Yet Defendants are asking the Court to adopt this type of requirement in order to prove threshold reliability of an expert opinion—an opinion, without which, a plaintiff has no case for her WG injuries. Since these types of studies would never be sanctioned in our society, the real-world implication of adopting such an unreachable standard is to foreclose any plaintiff who suffers an injury whose causal mechanism has not been "tested" from redress for the wrong inflicted upon them.

Existing Michigan law does not contemplate such an insurmountable barrier to establishing the threshold reliability of expert testimony. MRE 702, MCL 600.2955, and relevant precedent all focus on making sure that an expert's opinions are based on sound principles and methods, and provide several indicia of reliability. But there is no hard and fast rule that *all* factors must be met or that a medical "case on-point" must be offered in order to support an opinion. Just like lawyers use analogous cases to make a legal argument (despite no legal precedent directly "on-point"), so can experts in other fields utilize peer-reviewed literature to extrapolate support for the building blocks leading to the expert's ultimate conclusion.

A trial court's discretion in a *Daubert* challenge is properly limited to examining whether a plaintiff has made a baseline proffer showing that the expert's opinions are based on reliable principles and methods; that the opinions are not "junk science." If, after making its searching inquiry under MRE 702 and MCL 600.2955, a trial court determines that an

expert's opinions are supported by indices of reliability under §2955, then the Court must admit the expert's opinions. A trial court cannot, while making its inquiry, make credibility determinations favoring one expert's opinion over another, or put itself in the position of examining the proffered literature in its own "judicial search for truth." Undertaking such a role is outside the scope of a court's legal function and is an abuse of discretion.

It is for experts to evaluate and critique the probative value of peer-reviewed literature, and it is expected in such scientific endeavors that there will be conflicting opinions even among experts. Ultimately, the gatekeeping inquiry asks whether the expert has reached his or her conclusions in a sound manner, and not whether the expert's conclusions are correct. "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert v Merrell Dow Pharm., Inc*, 509 US 579, 596; 113 S Ct 2786 (1993).

STATEMENT OF FACTS

Amicus MAJ will not duplicate a statement of facts here since the facts of the case are already well set forth in the parties' briefing. *Walters v Falik* is before the Court again after remand to the Court of Appeals for reconsideration based on *Elher v Misra*, 499 Mich 11; 878 NW2d 790 (2016). In *Elher*, this Court examined the application of MRE 702 and MCL 600.2955 in the context of when a medical expert's standard of care opinions are unsupported by anything other than the expert's own personal beliefs. Given the lack of supporting literature or other evidence to show that the expert's opinions were reliable or

accepted within the relevant expert community, this Court held that the opinions were unreliable, and thus inadmissible.

During the same time that *Elher* was decided, *Walters* was pending on Defendants' application for leave to appeal before this Court. After *Elher* was released, this Court remanded *Walters* back to the Court of Appeals for reconsideration in light of *Elher*. After reconsideration, the Court of Appeals again reversed the trial court, holding that the trial court abused its discretion by striking Plaintiff's causation expert. Defendants again filed an application for leave to appeal, and this time the Court granted mini oral argument to determine whether to grant the application, deny it, or take other action. *Walters v Falik*, 499 Mich 904; 877 NW2d 723 (2016).

In its order, the Court asked parties to address "(1) whether the Court of Appeals erred in its interpretation of MCL 600.2955(1) and MRE 702; and (2) whether the trial court erred in its application of those evidentiary standards or abused its discretion in granting the defendants' motions to exclude the plaintiff's experts' testimony and for summary disposition." *Id*.

Amicus Curiae Michigan Association for Justice (MAJ) offers the following analysis regarding these issues.

ARGUMENT

Michigan's existing law regarding examining the threshold reliability of expert opinions is well-formed and does not need to be altered. Under the established standard, the trial court abused its discretion by striking Dr. Gershwin's opinions because the opinions passed threshold scrutiny and were based on reliable principles and methods. The Court of Appeals correctly applied existing law and determined that the trial court abused its discretion. This Court does not need to alter Michigan law on this issue, and should deny leave to appeal.

In its order granting mini oral argument, this Court asked parties to discuss whether the Court of Appeals erred in its interpretation of MRE 702 and MCL 600.2955, and whether the trial court erred and abused its discretion. MAJ submits that the Court of Appeals got it right, and the trial court abused its discretion by striking expert opinions that met threshold reliability principles.

Both the Court of Appeals and the trial court essentially relied on the same law: the same rule of evidence, the same statute, and the same Michigan precedent. But they reached different conclusions. So it is the interpretation and application of the law that is at issue. To support its analysis, MAJ will first go through an exposition of the existing legal standards and analysis of precedent and persuasive case law. Then, applying the existing law to the facts of this case, MAJ will show that the trial court erred in its application of existing law and abused its discretion by striking Dr. Gershwin's opinions as unreliable. Michigan law does not require an expert to find "on-point" peer-reviewed literature to support his or her opinions. Analogous studies that support an expert's logical reasoning and conclusions are sufficient to meet the §2955(a)(2) reliability factor. The Court of Appeals correctly interpreted and applied existing law and reached the right result. There is no need to change existing law, or to adopt unreachable reliability standards that would foreclose

justice for many of Michigan's injured citizens.

A. Standard of Review.

This Court reviews:

> the circuit court's decision to exclude evidence for an abuse of discretion. An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes. We review de novo questions of law underlying evidentiary rulings, including the interpretation of statutes and court rules. The admission or exclusion of evidence because of an erroneous interpretation of law is necessarily an abuse of discretion.
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> *Elher*, 499 Mich at 21 (cleaned up).

B. The existing Michigan standard for threshold admissibility of expert opinions: MRE 702, MCL 600.2955, *Daubert*, and a trial court's limited "gatekeeper" role.

Both federal and state decisions caution that while the trial court must make a "searching inquiry" as to whether proffered expert testimony satisfies the standards of reliability set forth in the rules of evidence - FRE 702 or MRE 702- or by statute - see, MCL 600.2955- the court's role extends no further than examining whether there is a scientifically reliable basis for the expert's opinion. A court should not undertake a "judicial search for truth" and try to determine whether or not the conclusions drawn by the expert are true or credible. That decision remains a matter for the jury to resolve.

The "searching inquiry" to be undertaken by the trial court is a flexible one focusing on the principles of methodology employed and not on the conclusions reached. *Daubert v Merrell Dow Pharm., Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993). The mere fact that two experts hold different opinions or come to diverse conclusions interpreting the facts of a

case is not a basis for concluding that one or the other is scientifically flawed. As long as the expert's opinion rests upon a reliable or well recognized scientific foundation, the court should admit the testimony. *Id*.

The admissibility of expert testimony is governed by MRE 702, which was amended effective January 2, 2004 to conform the rule more closely to FRE 702. It now provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The second sentence of the Staff Comment to the amended rule cites to *Daubert v Merrell Dow Pharm., Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993) and *Kumho Tire Co, Ltd v Carmichael*, 526 US 137; 119 S Ct 1167; 143 L Ed 2d 238 (1999), and states that, "The new language requires trial judges to act as gatekeepers who must exclude unreliable expert testimony." *People v Stanaway*, 446 Mich 643, 692–693; 521 NW2d 557 (1994).

In *Daubert,* the United States Supreme Court held that general acceptance of scientific evidence in the field to which it belongs was not a precondition to admissibility under FRE 702, thus overruling *Frye v United States*, 293 F 1013; 54 App DC 46 (DC Cir 1923).[1] Instead,

1 In *People v Davis*, 343 Mich 348, 370-371; 72 NW2d 269 (1955), the Court adopted *Frye* and applied a "general scientific recognition" test in holding polygraph results inadmissible. The *Davis-Frye* test precluded admission of novel scientific evidence unless the proponent showed it had "gained general acceptance in the scientific community" to which it belonged. *Droste v City of Highland Park*, 258 Mich 1, 9; 241 NW 823 (1932); *People v Coy*, 258 Mich App 1; 669 NW2d 831 (2003). The *Davis-Frye* test was applied only to novel scientific

Daubert held that FRE 702 merely requires the trial judge to ensure that an expert's testimony is relevant to the issues. Pertinent evidence based on scientifically valid principles will satisfy those demands, even if the scientific evidence is not generally accepted in the field. *Daubert* was clearly intended to "allow district courts to admit a somewhat broader range of scientific testimony than would have been admissible under *Frye*." *Gen Elec Co v Joiner*, 522 US 136, 142; 118 S Ct 512; 139 L Ed 2d 508 (1997) (emphasis added). *Daubert* defined the trial court's special role as a "gatekeeper" with regard to expert opinion testimony and evidence:

> The trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable. *Daubert*, 509 US at 589.

The *Daubert* Court established the following non-exclusive, four-part test to be utilized by trial courts in determining whether the proposed expert testimony or evidence is reliable:

> (1) Can the underlying scientific theory or technique be tested;
>
> (2) Has the theory or technique been subjected to peer review and publication;
>
> (3) Is there a known or potential rate of error for the particular scientific technique; and
>
> (4) Whether the underlying scientific technique has achieved a particular degree of acceptance within the relevant scientific community. [*Id.* at 592-594.]

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techniques or principles. *Davis-Frye* did not apply to scientific evidence already in the relevant scientific community. *People v Haywood*, 209 Mich App 217, 221-224; 530 NW2d 497

When the Supreme Court revisited this issue in *Kumho Tire Co, Ltd*, *supra*, p 137, it relaxed the emphasis on the four factors suggested in *Daubert*, clearly noting that the above-listed factors are not exclusive, and that it is the trial court's function to examine those factors which bear upon the reliability of a particular opinion in light of the circumstances of each particular case. *Kumho*, 119 S Ct at 1175. *Daubert* and its progeny emphasized that expert witness testimony was not to be subjected to an inflexible and unattainable standard. In fact, the Supreme Court explained that scientific testimony need not be "known to a certainty" in order to be admissible. The *Daubert* Court noted:

> **Of course it would be unreasonable to conclude that the subject of scientific testimony must be "known" to a certainty. Arguably, there are no certainties in science**. [*Id.* at 590 (emphasis added).]

The *Daubert* court emphasized the important role of "inference" in expert scientific testimony and stressed that expert opinions may properly be based upon logical extensions of what is known, stating:

> **But in order to qualify as "scientific knowledge", an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation – - i.e., "good grounds", based on what is known.** In short, the requirement that an expert's testimony pertain to "scientific knowledge" establishes a standard of evidentiary reliability. [*Id.* at 590 (emphasis added)].

Where an expert's opinions are based on the same methodology as that used by clinicians treating patients, for example, there is ample justification for admissibility. The diagnoses and prognoses of medical doctors are ordinarily admissible in evidence when based on the same information, methods and clinical experience employed in treating

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(1995).

patients. *Best v Lowe's Home Centers, Inc*, 563 F3d 171, 178–182 (CA 6 2009); *Dickenson v Cardiac & Thoracic Surgery of E Tenn*, 388 F3d 976, 980–982 (CA 6 2004); *Heller*, supra, p 146; *Gass v Marriott Hotel Services, Inc*, 558 F3d 419, 426–427 (CA 6 2009)(applying federal rule 702).

The test is whether the opinion is based upon valid reasoning or a reliable methodology. *Kannankeril v Terminix Intern, Inc*, 128 F3d 802 (CA 3 1997). The factors listed in *Daubert* (and expressly codified in our MCL 600.2955), are simply useful guidelines for making this determination, not hurdles that a party must overcome in order to have expert testimony admitted. *Heller v Shaw Indus, Inc*, 167 F3d 146 (CA 3 1999). A party seeking to exclude or admit expert testimony must do more than enumerate these factors and tally the number that are or are not met by a particular expert. *Id.* An expert's conclusion is admissible if there are grounds for that conclusion, even if there may be some flaws to the expert's methods or there are arguable grounds for some alternative conclusion. *Id.* See also, *In re Paoli RR Yard PCB Litig*, 35 F3d 717 (CA 3 1994).

The evidentiary standard of reliability is much lower than the standard of correctness. A court should find an expert's opinion reliable if it is based on good grounds, i.e., upon the methods and procedures of science. *In re Paoli R.R. Yard PCB Litig*, *supra* at 717. The grounds merely have to be good, not perfect, and the court should exclude opinion evidence only when it is seriously flawed. An opinion grounded upon the facts, known scientific principles, professional experience, and the application of logic, is one that rests upon a reliable methodology and should be admitted into evidence. All other criticisms merely go to the weight, not to the admissibility, of the evidence. *Lopez v Gen Motors Corp*,

224 Mich App 618, 632, n. 20; 569 NW2d 861 (1997); *People v Stiller*, 242 Mich App 38, 55; 617 NW2d 697 (2000).

The trial court in this case conflated scientifically valid "inferences" or "assertions," which have a medical and scientific basis, with mere speculation, which lacks any scientific or medical foundation. See, e.g., *Jahn v Equine Services, PSC*, 233 F3d 382 (CA 6 2000) (inferences based upon known scientific principles are admissible into evidence). In fact, trained experts commonly extrapolate from existing data, and may properly do so. See, e.g., *Gen Elec Co*, *supra*,. To extrapolate simply means "to infer from something that is known" or, more scientifically, "to estimate (the value of a variable) outside the tabulated or observed range". *Random House Websters Unabridged Electronic Dictionary* (1996). This is consistent with the *Daubert* court's finding that "drawing an inference" from valid data comports with the scientific method and should not be excluded. *Daubert*, supra at 590.

In *Gilbert*, this Supreme Court explained that the amendment of MRE 702 "explicitly" incorporated the *Daubert* standards and replaced the requirement of general recognition with a requirement of scientific reliability, "reached through reliable principles and methodology." *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 781-782; 685 NW2d 391 (2004). Pursuant to *Daubert*, a court must ***"exclude junk science."*** *Id.*

Additionally, MCL 600.2955(1), which is essentially a codification of the *Daubert* factors, provides that, in a personal injury action, "a scientific opinion rendered by an otherwise qualified expert is not admissible unless the court determines that the opinion is reliable and will assist the trier of fact." To make this determination, a court must, in accordance with the statute, "examine the opinion, and the basis for the opinion, . . . and

shall consider all of the following factors":

> (a) Whether the opinion and its basis have been subjected to scientific testing and replication.
>
> (b) Whether the opinion and its basis have been subject to peer review publication.
>
> (c) The existence and maintenance of generally accepted standards governing the application and interpretation of a methodology or technique and whether the opinion and its basis are consistent with those standards.
>
> (d) The known or potential error rate of the opinion and its basis.
>
> (e) The degree to which the opinion and its basis are generally accepted within the relevant expert community. As used in this subdivision, "relevant expert community" means individuals who are knowledgeable in the field of study and are gainfully employed applying that knowledge on the free market.
>
> (f) Whether the basis for the opinion is reliable and whether experts in that field would rely on the same basis to reach the type of opinion being proffered.
>
> (g) Whether the opinion or methodology is relied upon by experts outside of the context of litigation. [MCL 600.2955(1)]

The statute does not require that each and every one of these seven factors favor the proffered testimony. *Chapin v A & L Parts, Inc*, 274 Mich App 122, 137; 732 NW2d 578 (2007). Instead, like the *Daubert* factors, it is up to the courts to determine the relevant factors and to conduct an inquiry as to threshold reliability of the proffered expert opinions.

This Court recently examined the application of MRE 702, MCL 600.2955 and relevant cases in *Elher v Misra*, 499 Mich 11; 878 NW2d 790 (2016). In *Elher*, Defendant, a general surgeon, clipped the wrong bile duct during plaintiff's laparoscopic gallbladder

surgery. Plaintiff's expert, Dr. Paul Priebe, was a general surgeon with extensive experience in the procedure and testified that clipping a patient's common bile duct during an otherwise uncomplicated operation is a breach of the standard of care. Defendants' expert opined that bile duct injuries frequently occur even absent professional negligence. Defendants insisted that plaintiff's expert's testimony was not reliable under MRE 702. The trial court agreed with defendants, excluded plaintiff's expert's testimony, and dismissed the case.

The trial court relied on three of the *Daubert*/MCL 600.2955 "guideposts" to conclude that Dr. Priebe's opinion was not reliable: 1) the absence of "scientific testing and replication" for Dr. Priebe's standard-of-care opinion, 2) the lack of evidence that "Dr. Priebe's opinion and its basis have been subjected to peer review publication," and 3) Elher's failure to demonstrate the degree to which Dr. Priebe's opinion and its basis are generally accepted within the relevant expert community. The Court of Appeals reversed.

This Court reversed the Court of Appeals and held that the trial court correctly precluded Plaintiff's expert. The Court agreed with the Court of Appeals regarding the "scientific testing and replication" factor, but disagreed as to the other two. With respect to the "absence of scientific testing and replication" factor, this Court concluded that the factor did not "fit" with the facts of the case. The Court reasoned that Dr. Priebe's opinion—that the wrong bile duct cannot be clipped absent malpractice—is not a subject that lends itself to scientific testing or replication. Accordingly, this Court concluded that the trial court abused its discretion by relying on this factor. *Elher*, 499 Mich at 27.

However, this Court disagreed with the Court of Appeals as to the applicability of

the other two factors and determined that, as a whole, the trial court did not abuse its discretion by precluding Dr. Priebe's testimony. First, with respect to the "peer-reviewed literature" guidepost, the Court noted that Dr. Priebe's assertion that no peer-reviewed literature could be found to inform the issue of the applicable standard of care was belied by the fact that defendants attached peer-reviewed literature to their filings on the issue. Thus, the Court of Appeals erred in disregarding the trial court's reliance and analysis of this guidepost to determine threshold liability. *Id.* at 13-14. The Court also held that the Court of Appeals misinterpreted the "degree of general acceptance in the relevant expert community" guidepost. *Id*.

Notably, *Elher* did not create a new threshold for admissibility, nor did it provide novel interpretation of existing standards under MRE 702 and MCL 600.2955. Instead, the Court reversed the Court of Appeals because the Court of Appeals disregarded as inapplicable two salient guideposts that were relied on by the trial court. Upon review, the Supreme Court explained that the "general acceptance" and "availability of peer-reviewed literature" guideposts were probative to the reliability analysis, and the trial court correctly undertook analysis of these factors. Plaintiff's expert could point to nothing other than his own personal beliefs as support for his opinion regarding the applicable standard of care. This proved to be fatal in terms of establishing threshold reliability for his expert opinion.

Elher dealt with a medical expert's standard of care opinions. This case deals with Dr. Gershwin's causation opinions establishing a causal link between exposure to phosphoric acid and onset of WG. The two types of opinions are fundamentally different. The former seeks to establish what a doctor should do to be within the standard of care for his specialty.

The latter seeks to explain the causal mechanism when conduct that falls below the standard of care results in injury.

The analysis provided by the Court of Appeals in *Chapin v A & L Parts, Inc,* 274 Mich App 122; 732 NW2d 578 (2007), leave to appeal denied in 478 Mich 916 (2007), is instructive as to how the principles outlined above should be employed by a trial court in a scenario analogous to the one here, where an expert extrapolates causation testimony without an on-point medical study linking negligent conduct with a plaintiff's damages. In *Chapin*, plaintiffs claimed that exposure to asbestos in brake linings that were ground in defendant's shop caused them to develop mesothelioma. They offered expert testimony that such exposure was a cause of this type of lung cancer. Defendants objected that this testimony was inadmissible, primarily arguing that no epidemiological studies have been done establishing a relationship between automotive brake dust and mesothelioma. In essence, the defendants argued that there was no medical literature "on-point" establishing a causal link to the plaintiff's damages. However, the trial court examined the reasoning and methodology underlying the expert's conclusion (that mesothelioma was a rare disease, that exposure to asbestos was a clearly established risk factor for this disease, that grinding of brake linings produces asbestos) and held the expert's testimony to be admissible. Writing the lead opinion, then-Judge Alton Davis noted that while the court is required to "consider" all the factors listed in MCL 600.2955 in making its determination as to admissibility, "the statute does not require that each and every one of those factors must favor the proffered testimony."

The *Chapin* opinion went on to make the important observation that a trial court's

role in determining threshold reliability is limited to being a "gatekeeper role." "[T]he trial court's role as gatekeeper does not require it to search for absolute truth, to admit only uncontested evidence, or to resolve genuine scientific disputes. The fact that an opinion held by a properly qualified expert is not shared by all others in the field or that there exists some conflicting evidence supporting and opposing the opinion do not necessarily render the opinion 'unreliable.'" *Chapin*, 274 Mich App at 127. "The fact that two scientists value the available research differently and ascribe different significance to that research does not necessarily make either of their conclusions unreliable." *Id* at 139. The Court recognized that "science is, at its heart, itself an ongoing search for truth, with new discoveries occurring daily, and with regular disagreements between even the most respected members of any given field." *Id*.

Chapin wisely cautioned that a *Daubert* hearing "is not a judicial search for truth" because "courts are unlikely to be capable of achieving a degree of scientific knowledge that scientists cannot." *Id*. The Court explained that a trial court's inquiry under MRE 702 and MCL 600.2955 "is merely a *threshold* inquiry to ensure that the trier of fact is not called on to rely in whole or in part on an expert opinion that is only masquerading as science. The courts are not in the business of resolving scientific disputes." *Chapin*, 274 Mich App at 139.

Thus, a court's proper role (and resulting legal discretion) is only to "filter out expert evidence that is unreliable, not to admit only evidence that is unassailable. The inquiry is not into whether an expert's opinion is necessarily correct or universally accepted. The inquiry is into whether the opinion is rationally derived from a sound foundation." *Id*.

C. After remand, and after reconsideration in light of *Elher*, the Court of Appeals correctly applied MRE 702, MCL 600.2955 and relevant law to conclude that the trial court abused its discretion by precluding Dr. Gershwin's testimony.

Fundamentally, neither party disagrees about the principles outlined in the previous section (although different writers may choose to highlight different nuances). The dispute always comes down to how the principles are applied to any given case. The questions posed by this Court ask whether the Court of Appeal or the Circuit Court correctly interpreted the law. The Circuit Court held that Dr. Gershwin's opinions were speculative and unreliable because Dr. Gershwin was unable to find "on-point" peer-reviewed literature to support his opinion. The Circuit Court discounted all the literature that Dr. Gershwin did rely on to support his opinions.

The facts of *Walters*, although not similar to *Elher*, are analogous to other cases that this Court has seen. Plaintiffs have made their record, and provided this Court with extensive briefing regarding Dr. Gershwin's testimony, his reliance on available peer-reviewed literature to support parts of this opinions, and his analysis given the scientific methodologies available to him, including use of the "Sir Bradford Hill" methodology of establishing causation. In *Chapin*, the Court of Appeals recognized the "Sir Bradford Hill" methodology for determining causation and recognized the method as a reliable. The methodology is primarily intended to determine cause and effect where epidemiological studies are unavailable. *Chapin*, 274 Mich App at 133. The Sir Bradford Hill methodology contains nine criteria: strength of association; temporality (cause must precede effect); biologic or response gradient (basic toxicological knowledge); consistency; specificity, biological plausibility; coherence; experimental evidence; and analogy. *Id*. at 133–134. Dr.

Gershwin's opinions were formed utilizing this methodology. MAJ will not replicate the arguments regarding the "Sir Bradford Hill" methodology here, and will only say that it agrees with Plaintiff's analysis in its entirety.

MAJ's analysis will focus on the larger issue presented by the Court's order: what *type* of "peer-reviewed literature" relied upon by an expert will be deemed sufficient to establish threshold reliability for admissibility. Unlike the expert in *Elher*, Dr. Gershwin has relied on multiple sources of peer-reviewed literature for support of his opinions. The trial court improperly discounted the importance of this literature by attacking it piecemeal and dismissing Dr. Gershwin's opinions wholesale as "speculative." Defendants have focused their argument by advocating that only peer-reviewed literature that is "on-point" can be considered a "reliable" basis for an expert's opinions. In short, Defendants are asking this Court to adopt a new rule whereby only direct epidemiological and case studies can be considered "reliable" literature in support of MCL 600.2955(1)(b) ("Whether the opinion and its basis have been subject to peer review publication."). Defendants argue that analogous peer-reviewed literature is simply not good enough and must be ignored.

Defendants' reading of the statute would conflate §2955(1)(b) with (1)(a), ("Whether the opinion and its basis have been subjected to scientific testing and replication.") We can all agree that scientific testing and replication of studies that purposefully subject a human being to exposure to phosphoric acid is reprehensible. No rational jurist would ever find that this factor "fits" or is relevant to a reliability analysis of an expert's opinions in this context. See *Elher,* 499 Mich at 27 (holding that the "scientific testing and replication" factor does not fit the medical standard of care opinion at-issue, and reliance on that factor to

support striking the expert's opinion was an abuse of discretion).

This rationale does not change when the exact same principle is analyzed with respect to the "peer-reviewed literature" factor in §2955. The only way that Plaintiff's expert could obtain "on-point" literature is if someone, somewhere, experimented on people with phosphoric acid. Requiring epidemiological studies to establish direct causation is tantamount to requiring potentially fatal experimentation on human beings in the name of "accurate" science. Such studies are unethical and abhorrent in a civilized society. This method of conducting human experiments has been universally rejected.[2]

Defendants advocate that the analogous literature Dr. Gershwin relied on (showing a causal connection between exposure to phosphoric acid and the onset of WG) is not probative because the studies do not deal with the specific facts presented in this case: exposure of a caustic phosphoric acid solution to the gums. Defendants ask this Court to adopt a new rule whereby only directly "on-point" case studies are probative, and analogous literature should be ignored. But this would be an impossible standard for many injured citizens to meet. Direct application of a phosphoric acid solution to the gums is not

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[2] See *The World Medical Association Declaration of Helsinki: Ethical Principles for Medical Research Involving Human Subjects*.JAMA. 2013;310(20):2191-2194. doi:10.1001/jama.2013.281053 <https://jamanetwork.com/journals/jama/fullarticle/1760318> (accessed November 6, 2017).
See also the Nuremburg Code 70 Years Later, JAMA. 2017;318(9):795-796. doi:10.1001/jama.2017.10265. ("Biological experiments" are prohibited by the First and Second Geneva Conventions, while the Third and Fourth Geneva Conventions prohibit "medical or scientific experiments" not justified by the medical treatment of the person concerned. First Geneva Convention, Article 12; Second Geneva Convention, Article 12; Third Geneva Convention, Article 13; Fourth Geneva Convention, Article 32. In other words, the experiment would constitute a war crime.)

something that occurs absent (gross) error, and case studies in these circumstances do not exist. The facts of this case, and many other cases, do not lend themselves to being set up for a case study analysis. Thus, without intentionally conducting experiments exposing people to phosphoric acid, there is no way to get direct on-point studies.

What the trial court undeniably held was that, absent medical studies that clinically and purposefully subject human beings to tests exposing them to caustic chemicals, the causal link between plaintiffs' claimed injuries and the risk factors leading to the injury cannot be "reliably established." This is a gross mischaracterization of the reliability standard articulated in MRE 702 and *Daubert*, and is simply not the manner in which modern medicine is practiced in the United States. As this Court recognized in *Elher*, scientific testing and replication may not be feasible, and will not "fit" the type of expert opinion at issue in this case. *Elher*, 499 Mich at 27. The corollary is that, if scientific testing and replication is not feasible, then requiring "peer-reviewed literature" that must stem from this type of testing also does not "fit," and would not be relevant to judging the threshold reliability of an expert's opinions.

Subsections 2955(1)(a) and (b) are two separate factors and, based on this Court's own rules of statutory construction, the two should not be read as if they mean the same thing (which would render one of the factors a nullity).[3] The two distinct factors each designate a different analysis. If Defendants' analysis were to be believed (that only direct epidemiological pass muster as "reliable" peer-reviewed literature), then factors (a) and (b)

[3] "Whenever possible, every word of a statute should be given meaning. And no word should be treated as surplusage or made nugatory." *Apsey v Mem Hosp*, 477 Mich 120,

would be indistinguishable. The Court should reject reading the statute in this manner.

Instead, the Court should read §2955(1)(b) as it always has, to determine "[w]hether the opinion and its basis have been subject to peer review publication." The "basis" of an opinion can include the "ultimate conclusion," but it also includes all the steps in the analysis and deductive reasoning extrapolated to an ultimate conclusion. That is precisely how Dr. Gershwin has relied on peer-reviewed publication in this case. He has augmented each step of his analysis with the support of peer-reviewed literature. Dr. Gershwin's reliance on this literature means that the basis of his opinions have been subject to peer review publication, and his opinions meet the §2955(1)(b) factor of reliability.

Once Dr. Gershwin's opinions met this standard, the Circuit Court did not have the discretion to disregard this factor, or to engage in its own analysis of whether the proffered literature was "worthy of belief," thereby conducting its own "judicial search for truth." That is not a trial court's role, and engaging in this type of analysis is an abuse of discretion. The court has no expert knowledge, is not a scientist, and stepped well outside its role as a gatekeeper by attempting to academically critique scientific articles to determine their probative value. It is for the experts to evaluate and critique the probative value of peer-reviewed literature, and for the jury to decide which experts to believe. It is expected in scientific endeavors that there will be conflicting opinions, even among the most learned experts.

Ultimately, the gatekeeping inquiry asks whether the expert has reached his or her conclusions in a sound manner, and not whether the expert's conclusions are correct.

127; 730 NW2d 695, 699 (2007).

Science, medicine and law are ever-evolving professions. There is rarely an "on-point" answer. Just as no two patients are alike, no two cases are alike. The ever-changing nature of these professions requires careful analysis that is extrapolated from past experiences. Here, Dr. Gershwin used the past experiences of scientists, coupled with his own expertise and medical knowledge, and from those experiences/studies extrapolated an opinion that meets the threshold reliability requirements of MRE 702 and MCL 600.2955. "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert*, 509 US at 596.

CONCLUSION

This Court should deny leave to appeal. There is no reason to change the current well-formed law regarding determining threshold admissibility of expert opinions. Adopting Defendants new "on-point" peer-review literature rule would be a drastic change to existing law, present an insurmountable burden on plaintiffs, and would be a radical departure from what other jurisdictions require to establish threshold reliability of expert opinions.

Respectfully submitted,

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